APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, April 27, 1964
Before
Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 14119

JEWEL TEA COMPANY, INC., a New York corporation,
Plaintiff-Appellant,

v.

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC, an Illinois corporation, and CHARLES H. BROMANN,
Defendants-Appellees.

No. 14196

JEWEL TEA COMPANY, INC., a New York corporation,
Plaintiff-Appellant,

v.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court dismissing the case as to defendants Associated Food Retailers of Greater Chicago, Inc. and Charles H. Bromann, and the judgment of that Court dismissing the case as to all other defendants therein be, and the same is hereby, REVERSED, with costs. IT IS further ordered that case No. 14119 be, and the same is hereby REMANDED to the said District Court for such further proceedings as may be consistent with the opinion of this Court filed this day; and that case No. 14196 be, and the same is hereby REMANDED to the said District Court with direction to enter a declaratory judgment and an injunction substantially as prayed in the complaint herein and to ascertain and award to plaintiff such monetary relief as may be appropriate under the opinion of this Court filed this day.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 14119, 14196

SEPTEMBER TERM, 1963 APRIL SESSION, 1964

No. 14119

JEWEL TEA COMPANY, INC., a New York corporation,
Plaintiff-Appellant,

v.

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC, an Illinois corporation, and CHARLES H. BROMANN,
Defendants-Appellees.

No. 14196

JEWEL TEA COMPANY, INC., a New York corporation,
Plaintiff-Appellant,

v.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

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April 27, 1964

Before HASTINGS, *Chief Judge*, and DUFFY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Jewel Tea Company, Inc., a New York corporation, plaintiff, has appealed from

judgments entered by the district court, after our remand in case No. 12653.[1]

This action is for a declaratory judgment and seeks relief under the Sherman Act. 15 U.S.C.A. §§ 1 and 2.

At a trial, the district court dismissed defendants Associated Food Retailers of Greater Chicago, Inc., an Illinois corporation, and Charles H. Bromann, its secretary, at the close of plaintiff's case,[2] which action is attacked in No. 14119, and dismissed the complaint as to the defendants Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638 of Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO and certain officers and representatives of the unions as named in our opinion in case No. 12653, at the close of all the evidence,[3] which action is attacked in No. 14196. The appeals have been consolidated here.

Plaintiff contends that the district court erroneously failed to follow the law of the case and the principles of antitrust law, and disregarded the arbitrary and unreasonable nature of the restraint (imposed by defendants on plaintiff's business) and the magnitude of its effect on trade. Defendants urge that plaintiff failed to prove a conspiracy, and that union activity to attain market operating hours is a reasonable regulation of trade not within the prohibition of the Sherman Act, and does not restrain interstate commerce. Also, they argue that plaintiff failed to prove injury to its business or property and that it is *in pari delicto*.

In our prior opinion, at 221, we said:

"Facts set forth in the complaint show a 'widespread public demand in the Chicago area that meat

[1] 274 F. 2d 217 (1960); cert. den., 362 U.S. 936.

[2] 215 F. Supp. 837.

[3] *Ibid.* 839.

be available for retail purchase at Jewel stores during one or more evenings of the week.' Plaintiff has an untrammeled right to determine its course of action in respect to this matter.

"Whether one system of marketing or another offers the greater good and better prices in any given community is to be determined by the public: the laws of free competition may not be thwarted by a combination of employers and unions who conspire to prevent commercial development."

The evidence admitted by the district court on remand is in the record now before us. It sustains the material allegations of the complaint. There are no factual disputes revealed by the evidence. No question as to the credibility of any witnesses on any issue which we consider relevant, has been raised. Therefore, our holding of the law on the facts as stated in the complaint we now adopt as our holding of the law as applied to the evidence upon remand. Especially do we reaffirm our rejection of defendants' contention that an agreement pertaining to market operating hours is exempt from the antitrust laws since it was entered into in the self-interest of the employees to attain or maintain conditions deemed by the union relevant to the employees' working welfare. Significantly, we then quoted from *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945), where the exemption was qualified, the court stating at 808-810:

"* * * Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and *to control the marketing of goods and services.*

* * * * * * * * * *

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone

or in combination with business groups. * * * " (Emphasis supplied.)

The district court sought to support its decision by citing the fact that, as a result of collective bargaining between the meat butchers and the retailers in 1920, they entered into an agreement which covered many questions in dispute, including a limitation on marketing hours. The court points out that when plaintiff came into the Chicago area in 1933, it entered into similar agreements with defendant unions. Such agreements did follow in succession until 1957 when plaintiff raised and insisted upon the position it takes in this case. Plaintiff in 1957, 1959 and 1961 sought an agreement on evening operations. It was unsuccessful.

The district court states as its principal finding that the "restriction [against evening hours] was imposed after arm's length bargaining, * * * These are not objects which the anti-trust laws proscribe. They are conditions of employment, and as such are clearly within the labor exemption of the Sherman Act. * * * " We cannot agree. To make a business succeed, thereby furnishing employment to persons engaged in its operation, the responsibility rests upon the employer to determine where the business will be located, his acquisition of necessary buildings and fixtures, the installation of the business and its subsequent maintenance, his establishment of credit with suppliers of commodities and the various other responsibilities resting upon a proprietor. One of the proprietary functions is the determination of what days a week and what hours of the day the business will be open to supply its customers. Among the decisions which the proprietor must make and upon which his success and the livelihood of his employees depend is how to attract customers, which must be accomplished by the quality of merchandise offered at such

times as shall be convenient to the public.[4] It follows clearly that whether fresh meats are to be sold after 6 P.M. depends upon the convenience and requirements of the people living within shopping distance of the place of business. The hours of the day when his business is to be open to accommodate the demands of customers, in the judgment of the owner of the business, is not a condition of employment, contrary to the district court's finding. As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business, engaged in handling products in the course of interstate commerce, is a violation of the Sherman Act, and not entitled to the exemption therefrom claimed by the defendant unions in this case.

The district court overlooks the fact that whether the butchers have jobs at all depends on whether they will serve the demands of the public. It also overlooks that the furnishing of a place and advantageous hours of employment for the butchers to supply meat to customers are the prerogatives of the employer. As we said (274 F. 2d at 221):

> "* * * An employer has the right and it is his duty, if he is to survive commercially, first to determine the needs of the public, second to provide a time, a place and facilities for meeting those needs, and third to provide, under the terms of the National Labor Relations Act, the services of employees to accomplish the

[4] The district court summarily disposed of the effect on the public of evening shopping for fresh meat, by saying:

> "The only conceivable deleterious effect on the public from the restriction here is that those persons who find it more convenient to shop for meat at night are deprived of that convenience. * * *"

foregoing objectives. The rights of labor attach only to the *third*, and if any effort is made by labor to infringe rights of the employer in the first or second field, it is not shielded from the sword of the anti-trust laws. Determining the needs of the public and meeting those needs are inherent proprietary rights and obligations of the employer and must be clearly distinguished from his rights and duties as master in the master and servant relationship. Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area." (Italics supplied.)

Defendants would apply to their purpose *Board of Trade* v. *United States*, 246 U. S. 231 (1918). In that case the court found that a rule of the Chicago Board of Trade had only a slight effect as a restriction upon free competition in the pricing of grain and, at 240, said that it "created a public market for grain 'to arrive' ". It pointed out that it provided an improvement in actual market conditions in several specific ways and thus was promotive of competition rather than destructive thereof in its actual effect.

There is *no* evidence in *this* record showing that the net effect of the market hours restraint promotes competition. The opinion of the district court is devoid of *any* finding to that effect. On the contrary, the record shows that the effects of the restriction are wholly negative and destructive of competition. Even the district court expressly found that the restriction "obviously restrained a small segment of competition". We believe that the market hours restriction cannot come within the rule of reason announced in *Chicago Board of Trade* v. *United States, supra.* Moreover, a case concerned with the problems of a specialized commodity exchange and a rule therof which was affirmatively found to have *promoted* competition is scarcely authority for upholding a restraint which seriously suppresses

and interferes with competitive forces in a widespread retail marketing area. The district court's reliance on *Chicago Board of Trade* was, therefore, not justified.

In the case at bar, during oral argument, we were surprised by unions' counsel, who, while emotionally maintaining that union butchers should be given an opportunity to be with their children on Friday evenings, spurned a suggestion that other fathers in Chicago and its suburbs might desire to be at home with *their* children, while their wives took the family car to do their meat shopping on that evening. But defendants' counsel was positive that, in considering the application of the antitrust laws, the convenience and welfare of the public are irrelevant.

The evidence on remand supports the allegations of the complaint charging that the unions and the Associated Food Retailers of Greater Chicago, Inc., defendants, effectuated through a contract, an unreasonable restraint of trade. By detailed and persuasive evidence plaintiff has shown that, as a result, it has been injured in its business and property. The fact of defendants' unlawful restraint on interstate commerce is supported by convincing evidence.

As to the assertion that plaintiff is *in pari delicto*, we decided on the prior appeal, 274 F. 2d 217, 223:

> "Appellants next assert that plaintiff is without standing to sue because, as a party to the alleged illegal agreement it is *in pari delicto*. Appellants concede however, that the *in pari delicto* defense does not apply where plaintiff's participation in the wrong alleged was induced by economic necessity, or where plaintiff's wrongful act is divorced from the illegal conspiracy, agreement or combination alleged in the complaint.
>
> "* * * When a business organization is the victim of an *illegal conspiracy* between certain of its competitors and a labor union to restrain trade, the business organ-

ination is not required to fight the matter out by economic warfare thus subjecting its employees who are not members of the offending union, its customers, and its stockholders, to the losses, inconvenience and damages of a strike, all for the purpose of shielding itself from the *in pari delicto* stigma.

"In view of the factual situation which confronted plaintiff, the defense of *in pari delicto* is not available here. * * *"

We adhere to those views.

Plaintiff's complaint charged that defendants engaged in an unlawful combination and conspiracy to suppress competition among retail meat markets in the Chicago area and to prevent the sale of meat before 9 A.M. or after 6 P.M. Mondays through Saturdays.

In view of the facts in this case as shown by the evidence, it is clear that plaintiff proved that the unions, Associated Food Retailers and Bromann, its secretary, entered into a combination or agreement, which constituted a conspiracy, as charged in the complaint. It was therefore illegal and void because violative of the Sherman Act. *Allen Bradley Co.* v. *Local Union No. 3, supra*; cf. *United States* v. *Hutcheson*, 312 U. S. 219, 232 (1941).

In *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227 (1939), the court said:

"* * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. * * *"

In *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395 (1947), the court used the words "conspiracy" and "contract" interchangeably.

The district court in the case at bar found that "From 1957 Plaintiff sought exclusion of the restriction on night sales from the industry-wide contract, and the Defendant Local Unions resisted such exclusion. *The rest of the Industry agreed with the Defendant Local Unions to continue the ban on night operations.*" (Italics supplied.)

The agreement between the unions and Associated Food Retailers is still operative as shown by their common defense in this case.[5] Whether it be called an agreement, a contract or a conspiracy, is immaterial.

For the reasons above stated, we reverse the judgment of the district court dismissing the case as to defendants Associated Food Retailers of Greater Chicago, Inc. and Charles H. Bromann, and the judgment of that court dismissing the case as to all other defendants therein, and we direct, in case No. 14119, that said case be remanded to the district court for such further proceedings as may be consistent with this opinion; and in case No. 14196 we direct that said case be remanded to the district court to enter a declaratory judgment and an injunction substantially as prayed in the complaint herein and to ascertain and award to plaintiff such monetary relief as may be appropriate under this court's opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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[5] We granted Associated's motion that the Union's brief stand as the brief of Associated and Bromann, its secretary.

Likewise, in our prior opinion, 274 F. 2d 217, 222, note 4, we said:

> "Associated and Bromann have entrusted their interests in the defense of this suit to counsel for the unions. They formally adopted by reference the latter's motions and briefs."

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12653 SEPTEMBER TERM, 1959—JANUARY SESSION, 1960

JEWEL TEA COMPANY, INC., a New York corporation,
Plaintiff-Appellant,

v.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

January 11, 1960

Before DUFFY and SCHNACKENBERG, *Circuit Judges*, and PLATT, *District Judge*.

SCHNACKENBERG, *Circuit Judge*. Appellee, plaintiff below, is Jewel Tea Company, Inc. (herein called Jewel), a New York corporation operating 196 retail stores in and around the Chicago area, including four stores in northwestern Indiana. Defendants, Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638 of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (herein sometimes referred to as unions), Earl Saltow, Frank Fox, Earl Heinz, Harold L. Rosa, George Flosi, Lester Ferguson, Fred Clavio, Alex M. Neildbowski, Thomas F. Gorman, R. Emmett Kelly, Mark Cantrell, Casimir Walezak, Stanley Brodzinski and William A. Stepan, officers and representatives of said unions, appeal from orders denying, and adhering to the denial, a motion to dismiss Jewel's complaint alleging a violation of §§ 1 and 2 of the Sherman Antitrust Act.[1] The court

[1] 15 U.S.C.A. §§ 1, 2.

below entered an order authorizing an immediate appeal.[2] Also named as defendants, but not parties to the appeal, are Associated Food Retailers of Greater Chicago, Inc., an Illinois corporation (herein referred to as Associated), a not-for-profit trade association representing several thousand individual or independent food stores engaged in the retail sale of meat in the Greater Chicago area, and Charles H. Bromann, secretary and treasurer of Associated.

The complaint alleges that there are approximately 9,000 retail food stores in the Chicago area which sell meats, fish and poultry; their annual sales of such products exceed $5,000,000,000. Substantial portions of the meats and allied products so sold are acquired from without Illinois or acquired from suppliers in Illinois who have purchased said meats from out-of-state sources for resale to meat distributors, wholesalers and retail food stores in the Chicago area. Approximately 77.5% of such products retailed by plaintiff originate outside Illinois. Plaintiff's sales of meats, poultry, fish and similar items customarily sold in meat markets were approximately $85,000,000 in 1957.

Final preparation of the meats for sale to the public is generally performed by the retail meat markets themselves which employ and supervise members of defendant unions who perform this work. Jewel has introduced a "pre-packaged, self-service" system in approximately 174 of its stores, whereby the meat is cut, trimmed and wrapped in sanitary, transparent, cellophane packages in advance of sale. Under this system customers are able to purchase meat without waiting for services of a butcher, and butchers are able to prepare the meats without customer interruptions. Because of modern refrigeration equipment installed by plaintiff, prepackaged meats can

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[2] 28 U.S.C.A. § 1292 (b).

be sold during evening hours without a butcher in attendance.

The complaint further alleges that in the Chicago area there is a widespread demand that meat be available for retail purchase one or more evenings a week since in many households both husband and wife work during daytime hours or the family automobile is available for marketing only in the evening. Plaintiff would so provide convenient evening hours for sale of its meats except for an alleged conspiracy, which is the subject matter of this suit.

It is alleged that beginning ten years ago and continuing thenceforth, defendants have engaged in an unlawful combination and conspiracy to suppress competition among retail meat markets in the Chicago area and wholly to prevent the sale of meats and meat products before 9 A.M. or after 6 P.M. Mondays through Saturdays. In furtherance of this alleged combination or conspiracy, the defendants entered into an agreement, the substantial terms of which, according to the complaint, are that they agreed

> "(a) That no person or firm be permitted to engage in the retail sale of fresh beef, veal, lamb, mutton, or pork before 9:00 A.M. or after 6:00 P.M.
>
> (b) That defendant locals and their officials and representatives named herein refuse to allow members of their organization to sell fresh beef, veal, lamb, mutton or pork at retail before 9:00 A.M. or after 6:00 P.M.
>
> (c) That no person or firm be permitted to sell fresh beef, veal, lamb, mutton or pork at retail before 9 A.M. or after 6:00 P.M. with or without the employment of members of defendant unions outside those hours.
>
> (d) The co-conspirator members of defendant Associated have agreed among themselves to insist that

all collective bargaining agreements entered into between them and defendant unions or between defendant unions and plaintiff or other operators of food stores shall contain provisions prohibiting the sale at retail of fresh beef, veal, lamb, mutton or pork before 9:00 A.M. and after 6:00 P.M.

(e) Associated, its members and officers have conspired and agreed with the other defendants that neither plaintiff nor any other merchandiser is to be permitted to compete lawfully with them by operating self-service meat markets between the hours of 6:00 P.M. and 9:00 P.M.

(f) That defendant unions, their officers and members have acted as the enforcing agent of the conspiracy."

Under compulsion of the alleged conspiracy and the threat of strike by the unions, plaintiff asserts that it was forced to sign in late January and early February 1958 contracts with defendant unions containing the following restriction:

"Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."[3]

The remaining provisions of the collective bargaining contracts concern hours, wages and conditions of employment.

[3] This provision appears in each of two different collective bargaining agreements, one known as a "Service Contract" and applicable to "Service Meat Markets," the other known as a "Self-Service Contract" and applicable to "Self-Service Meat Markets." Each agreement effective October 6, 1957, runs until October 3, 1959, and from year to year thereafter, unless terminated by written notice given not less than 60 days prior to each expiration date.

1. The core of appellants' position in their motion to dismiss is that "the provisions pertaining to market operating hours and the basic work day are opposite sides of the same coin," since, as they assert, a change in one automatically affects the other. And because one side of this coin, hours of employment, is governed by the National Labor Relations Act, *ipso facto* the reverse side is also within the exclusive, regulatory scope of that act. Not only is the conclusion fallacious, but also the basic premise from which it is derived. An employer has the right and it is his duty, if he is to survive commercially, first to determine the needs of the public, second to provide a time, a place and facilities for meeting those needs, and third to provide, under the terms of the National Labor Relations Act, the services of employees to accomplish the foregoing objectives. The rights of labor attach only to the third, and if any effort is made by labor to infringe rights of the employer in the first or second field, it is not shielded from the sword of the antitrust laws. Determining the needs of the public and meeting those needs are inherent proprietary rights and obligations of the employer and must be clearly distinguished from his rights and duties as master in the master and servant relationship. Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area.

Facts set forth in the complaint show a "widespread public demand in the Chicago area that meat be available for retail purchase at Jewel stores during one or more evenings of the week." Plaintiff has an untrammeled right to determine its course of action in respect to this matter.

Whether one system of marketing or another offers the greater good and better prices in any given community is to be determined by the public: the laws of free competition may not be thwarted by a combination of

employers and unions who conspire to prevent commercial development.

Appellants rely on *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), to sustain their argument that market operating hours are so intimately connected with hours of employment that the two cannot be divorced. In that case several local unions entered into a collective bargaining agreement with a group of interstate motor carriers providing for regulation of rental fees and wages paid to owner-drivers of vehicles leased to the carriers. The court held that the leasing of these vehicles was a matter of collective bargaining, but carefully qualified this holding by stating, at 293:

> The text of the Article [agreement] and its unchallenged history show that its objective is to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs. This is thus but an instance, as this Court said of a somewhat similar union demand in another case, in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be a "scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98-99 • • •. The regulations embody not the "remote and indirect approach to the subject of wages" • • • but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract.

Although exercise of an employer's proprietary right to establish marketing hours may incidentally affect its employees, as will almost anything it does, it can hardly

be argued that such action is a "direct frontal attack" upon or even a "remote and indirect approach" to the subject of the basic work day. It is conceivable that maintenance of meat markets during evening hours will create even more jobs for union employees.

2. Appellants next assert that an agreement pertaining to market operating hours is exempt from the antitrust laws since it was entered into in the self-interest of the employees to attain or maintain conditions deemed by the union relevant to the employees' working welfare. *United States* v. *Hutcheson*, 312 U.S. 219 (1941). However, appellants recognize that *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797 (1945), qualifies this exemption. The Supreme Court there stated, at 808-810:

> • • • Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and *to control the marketing of goods and services.*
>
> • • •
>
> Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. (Emphasis supplied.)

The complaint states that defendant Associated is a trade association consisting of "several thousand individual or independent food stores engaged in the retail sale of meat for human consumption in the Greater Chicago area." The complaint further states that for many years past defendant Associated and its co-conspirator members and Bromann and the defendant unions, their officers and members, have insisted, despite public demand and interest to the contrary, that contracts between defendant unions and all operators of retail meat markets contain provisions prohibiting the retail sale of

meat after 6 P.M. and have exercised the unions' monopoly powers to effectuate that insistence.

The operation of this agreement has enabled Associated stores to remain closed after 6 P.M. without fear of losing trade to plaintiff, a major competitor, because of evening sales, and also to avoid the added expense of remaining open during the evening. Any attempt to clothe the alleged conspiracy with a robe of propriety by making the union a co-conspirator is to make the latter a vehicle for exempting an otherwise unlawful activity from the sweep of the Sherman Act. This the antitrust laws will not condone.[4]

3. To establish a violation of the Sherman Act the alleged contract, combination or conspiracy must be "in restraint of trade or commerce *among the several States* • • •." (15 U.S.C.A. § 1, emphasis supplied.) Appellants admit that the complaint sufficiently alleges the interstate flow of meats into the Chicago market, but assert that failure to allege diminution of this inflow is fatal to plaintiff's cause of action, since the retail trade of meats over the counter is purely a "local intrastate activity" which cannot in and of itself adversely affect interstate commerce. The complaint avers that the effects of the alleged unlawful agreement to limit marketing hours to 9 A.M. to 6 P.M. has been to restrain the flow of interstate trade and commerce of meats and meat products, and to maintain the price of retail meats above what they would otherwise be. In accordance with *United States* v. *Employing Plasters Ass'n.*, 347 U.S. 186, 189 (1954), we hold that the complaint properly charges a restraint of interstate commerce, and that plaintiff should be given an opportunity to introduce evidence to prove that these local restraints unreasonably burden the free a[illegible] unin-

[4] Associated and Bromann have entrusted their interests in the defense of this suit to counsel for the unions. They formally adopted by reference the latter's motions and briefs.

terrupted flow of meats into the Chicago market. "That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question." *Ibid.* See also *United States* v. *Employing Lathers Ass'n.*, 347 U.S. 198 (1954); *Local 167* v. *United States*, 291 U.S. 293, (1934); *Sandidge* v. *Rogers*, 256 F. 2d 269, 276 (7th Cir. 1958).

4. Appellants urge that the agreements in question to set market hours come within "the rule of reason", and are therefore not an unreasonable restraint of trade. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911). It is clear that a mere agreement to eliminate competition is not enough to condemn it, unless a *per se* violation. *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958); *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). A close and objective scrutiny of particular conditions and purposes is necessary in each case. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933). Therefore, such a determination cannot be disposed of on a motion to dismiss, but must be properly aired in a trial where both parties have an opportunity to offer evidence as to facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable; and the history of the restraint, *i.e.*, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). It is sufficient to permit the matter to go to trial in that the complaint alleges the unreasonableness of the restraint.

5. Appellants next assert that plaintiff is without standing to sue because, as a party to the alleged illegal agreement, it is *in pari delicto*. Appellants concede, however, that the *in pari delicto* defense does not apply where plaintiff's participation in the wrong alleged was induced by economic necessity, or where plaintiff's wrongful act is

divorced from the illegal conspiracy, agreement or combination alleged in the complaint.

Appellants rely principally on *Lewis* v. *Quality Coal Corp.*, 270 F.2d 140 (7th Cir. 1959), where this court held that "the threat to cause a *legal* strike and its attendant work stoppage does not of itself constitute duress." (Emphasis supplied.) *Id.* at 143. Unlike the alleged illegal agreement here, the majority opinion there held that the contract in question was legal. When a business organization is the victim of an *illegal conspiracy* between certain of its competitors and a labor union to restrain trade, the business organization is not required to fight the matter out by economic warfare thus subjecting its employees who are not members of the offending union, its customers, and its stockholders, to the losses, inconvenience and damages of a strike, all for the purpose of shielding itself from the *in pari delicto* stigma.

In view of the factual stituation which confronted plaintiff, the defense of *in pari delicto* is not available here. Private suits are merely a vehicle intended to further enforce the antitrust laws for the benefit of the real party in interest, the public. In the case at bar, the *in pari delicto* defense, therefore, cannot be allowed to thwart this congressional attempt to protect the public. The Supreme Court in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214 (1951) stated:

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

6. Appellants finally urge that plaintiff has suffered no injury to its business or property since the volume of goods

purchased would remain relatively constant regardless of any change in marketing hours. However, plaintiff alleges in its complaint that the illegal conspiracy eliminates operating economies which are available to plaintiff through evening operation of its special refrigerated cases and other capital equipment, and proper utilization of labor. Thereby, the public has been denied the benefit of lower prices and plaintiff has suffered loss of profits. As this court held in *A. C. Becken Co.* v. *The Gemex Corp.*, 272 F. 2d 1 (7th Cir. 1959), where the fact of actual damages has been proven, mere speculation as to the amount of those damages will not defeat the plaintiff's right to recover. We hold that this complaint properly alleges facts, which, if proven, will establish the fact of actual damages.

For the reasons hereinbefore set forth the orders of the district court are affirmed and this cause is remanded for further proceedings not inconsistent with the views herein expressed.

AFFIRMED AND REMANDED
FOR FURTHER PROCEEDINGS.

A true Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

Relevant Statutory Provisions

1. *The Sherman Antitrust Act* (26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. §§ 1, 2):

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. *The Clayton Act* (38 Stat. 731, 738, 15 U.S.C. § 17, 29 U.S.C. § 52):

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or by a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and per-

sons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the facts specified in this paragraph be considered or held to be violations of any law of the United States.

3. *The Norris-La Guardia Act* (47 Stat. 70, 29 U.S.C. § 101):

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

* * *

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any

strike or unemployment benefits or insurance, or other moneys or things of value.

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State.

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified,

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

* * *

Sec. 13. When used in this act, and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or

have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing insterests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

4. The *National Labor Relations Act* (61 Stat. 136, 29 U.S.C. § 151 *et seq.*):

Section 1. * * * The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the

flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a). . . .

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

• • •

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

• • •

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . .

5. *Title II, Labor Management Relations Act, 1947* (61 Stat. 152, 29 U.S.C. § 171):

Sec. 201. That it is the policy of the United States that—

• • •

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes. . . .

* * * * *

Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements. . . .

APPENDIX E

The Regulation of Market Operating Hours By Collective Bargaining Agreement in Areas Other Than Chicago

1. Operating hours of both grocery and meat departments in food stores in Cuyahoga County, Ohio (which includes Cleveland and has a population of 1,647,895),[1] are 9:00 a.m. to 6:00 p.m., Monday through Thursday, and 8:00 a.m. to 6:00 p.m., Friday and Saturday (R. 426, 428-429, 433-434, 438). These operating hours have existed at least since 1945, except that before 1952 the hours on Wednesday were 9:00 a.m. to 1:00 p.m. (R. 434-435). The operating hours are set by the collective bargaining agreements between Retail Store Employees Union Local 880 and District Union 427, Amalgamated Meat Cutters and Butcher Workmen of North America, on the one hand, and Cleveland Food Industry Committee and Great Atlantic and Pacific Tea Company, on the other (R. 428, 433-434, 438). The agreement between Retail Store Employees Union Local 880 and Cleveland Food Industry Committee provides that (def. ex. 23, art. II):

> STORE HOURS (Cuyahoga County)—Store operating hours in Cuyahoga County shall be as follows: Monday, Tuesday, Wednesday and Thursday, 9 a.m. to 6 p.m.; Friday and Saturday, 8 a.m. to 6 p.m.

In the six stores within Cuyahoga County in which the meat department employees are represented by District Union 427 but the grocery clerks are unrepresented, the meat department ceases operation at 6:00 p.m. and a sign is posted at the meat department stating that the 6:00 p.m. closing is pursuant to agreement with District Union 427 (R. 436-437).

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[1] U.S. Bureau of Census, Census of Population: 1960, Vol. 1, Characteristics of Population, Part A, Number of Inhabitants, p. 37-15 (U.S. Gov. Print. Off., 1961).

Outside Cuyahoga County, in the Ohio counties of Lake, Ashtabula, and Lorain, the store operating hours are 9:00 a.m. to 6:00 p.m., Monday through Thursday, 8:00 a.m. to 9:00 p.m., Friday, and 8:00 a.m. to 6:00 p.m., Saturday, and in the Ohio county of Medina the store operating hours are 9:00 a.m. to 6:00 p.m., Monday through Wednesday, 8:00 a.m. to 9:00 p.m., Thursday and Friday, and 8:00 a.m. to 6:00 p.m., Saturday (R. 433-434). The agreement between Retail Store Employees Union Local 880 and Cleveland Food Industry Committee provides that (Def. ex. 23, art. II):

> STORE HOURS (Outside County)—Store operating hours outside Cuyahoga County shall remain as presently constituted provided, however, that any employer who feels he must change hours to meet major competition will give the Union two weeks written notice of his intention before changing.

The population of Lake, Ashtabula, Lorain, and Medina Counties is 524,582.[2]

2. The collective bargaining agreement between Food Industry, Inc., and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union No. 81, covering meat markets in King and Kitsap Counties, Washington, which includes the principal city of Seattle, Washington, provides that (def. un. ex. 25, sec. 2 C, D):

> . . . there shall be no selling or delivery of fresh meat before 9:00 a.m. or after 6:00 p.m. or on Sundays or holidays, nor, except within these hours shall there be any soliciting in person or by telephone for sales of fresh meat . . .
>
> Customers, except those at the counter prior to 6:00 p.m., shall not be sold fresh meat after 6:00 p.m.

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[2] *Id.* at p. 34-45, *supra*, p. 31a, n. 1.

The collective bargaining between Wholesale and Retail Fish Dealers of Seattle, Washington, and Retail Fish Workers Local 81, Amalgamated Meat Cutters and Butcher Workmen of North America, provides that (def. ex. 26, § 2):

> No market shall be open before 9:00 A.M. or remain open after 6:00 P.M., or on Sundays or Holidays.

The population of King and Kitsap counties is 1,019,190.[3]

3. The agreement between Food Industry, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 151, covering meat markets in Snohomish County, Washington, which includes the principal city of Everett, Washington, provides that (def. ex. 27, § II 3, 4):

> . . . there shall be no selling or delivering of fresh meat before 9:00 A.M. or after 6:00 P.M., or on Sundays or holidays, nor, except within these hours shall there be any soliciting in person or by telephone for sales of fresh meat . . .
>
> Customers, except those at the counter prior to 6:00 P.M. shall not be sold fresh meat after 6:00 P.M.

The population of Snohomish County is 172,199.[4]

4. The collective bargaining agreement at Butte, Montana, between Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 333, and Silver Bow Employers' Association, provides that (def. ex. 28, art. X, § 5):

> There shall be no meat, meat products, poultry, fish, or any other article coming under the jurisdiction of the Butte Meatcutters' Union No. 333 in any type

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[3] *Id.* at p. 49-11, *supra*, p. 31a, n. 1.

[4] *Ibid.*

meat case, is to be sold or handled after the hours of 6:00 P.M. or before 8 A.M.

The population of Butte, Montana, is 27,877.[5]

5. At Anaconda, Montana, the collective bargaining agreement between Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 384, and Meat Dealers of Anaconda, Montana, provides that (def. ex. 29, art. 1(d)):

> Meat cutters, apprentices or meat wrappers shall be employed in meat markets between the hours of nine o'clock A.M. (9:00 A.M.) and six-thirty o'clock P.M. (6:30 P.M.) except as specified in Article Five.
>
> There shall be no meat, meat products, poultry, fish or any other article coming under the jurisdiction of the Anaconda Butchers' Union, Local #384, in any type meat case or to be sold or handled after the hours of six-thirty o'clock P.M. (6:30 P.M.) or before nine o'clock A.M. (9:00 A.M.) except as provided in Sections (a) through (d) of Article Five.

The exception in Article Five authorizes overtime "to be worked only in cases of emergency. . . ." The population of Anaconda, Montana is 12,054.[6]

6. The collective bargaining agreement with Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union 114, covering retail meat markets in St. Paul, Minnesota, and vicinity, provides that "Monday through Friday nights until 9 P.M. shall be the only scheduled night operation under this Agreement. All markets shall close at 6 P.M. on Saturday" (def. ex. 30, p. 3). The population of St. Paul, Minnesota is 313,411.[7]

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[5] *Id.* at p. 28-14, *supra*, p. 31a, n. 1.

[6] *Id.* at p. 28-14, *supra*, p. 31a, n. 1.

[7] *Id.* at 25-30, *supra*, p. 31a, n. 1.

7. At Kenosha, Wisconsin, until 1961, the collective bargaining agreement between Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union 283, and respondent and other employers, as interpreted by an arbitrator, had provided that "the sale of fresh meat is restricted to the hours of 7:00 A.M. to 6:00 P.M. Monday through Saturday, except on Friday night between the hours of 9:00 A.M. to 9:00 P.M." (R. 350-351). In 1961 a change in the agreement was negotiated to permit unlimited hours of operation (R. 349, 351). The population of Kenosha is 67,899.[8]

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[8] *Id.* at p. 51-11, *supra*, p. 31a, n. 1.

APPENDIX F

Defendant Union's Exhibit 5

[1961]

JEWEL FOOD STORES

COMPARISON OF 32 STORES IN 1961 IN WHICH FRESH MEAT IS SOLD AFTER 6:00 P.M. WITH DIVISIONS IN WHICH NO FRESH MEAT IS SOLD AFTER 6:00 P.M.

	[Fresh Meat Sold After 6:00 P.M.]	[Fresh Meat *Not* Sold After 6:00 P.M.]					
	32 stores	Div. 2 (27 stores)	Div. 3 (27 stores)	Dic. 4 (32 stores)	Div. 5 (45 stores)	Div. 6 (38 stores)	All Stores
Total Sales P.W.P.S. [per week per store]	$28,723	$31,612	$26,998	$29,679	$27,004	$29,588	
Total Earnings P.W.P.S.	$ 394	$ 1,536	$ 1,248	$ 1,614	$ 1,422	$ 1,271	
% Earnings To Sales	1.4	4.9	4.6	5.4	5.3	4.3	4.6

APPENDIX G

1960

COMPARISON OF THE 32 STORES IN 1960 SELLING FRESH MEAT AFTER 6:00 P.M. WITH THE DIVISIONS IN WHICH NONE OF THE STORES SOLD FRESH MEAT AFTER 6:00 P.M. IN 1960 AND WITH ALL STORES IN WHICH NO FRESH MEAT WAS SOLD AFTER 6:00 P.M. IN 1960

	32 Stores In Which Fresh Meat Sold After 6:00 P.M. def. ex. 4G	Fresh Meat *Not* Sold After 6:00 P.M.					All Stores In Which No Fresh Meat Sold After 6:00 P.M. (216 Stores)
		Division 2 (27 Stores) def. ex. 3F, p. 2	Division 3 (27 Stores) def. ex. 3F, p. 3	Division 4 (32 Stores) def. ex. 3F, p. 4	Division 5 (45 Stores) def. ex. 3F, p. 5	Division 6 (32 Stores) def. ex. 3F, p. 6	
Sales P.W.P.S.	$24,682	$30,765	$26,205	$29,477	$27,033	$29,930	$31,325[1]
Earnings P.W.P.S.	$ 380	$ 1,617	$ 1,356	$ 1,636	$ 1,527	$ 1,452	$ 1,509[2]
% Earnings To Sales	1.5%	5.3%	5.2%	5.6%	5.6%	4.9%	4.8%

[1] This figure is derived from the "Company Totals per Report" on the last page of def. un. ex. 3F. The total sales P.W.P.S. of $352,633,819 are reduced by $789,841, the latter being the total sales P.W.P.S. for the 32 stores in which fresh meat was sold after 6:00 P.M. The difference is divided by 216, the latter being the number of stores in which fresh meat was not sold after 6:00 P.M. The resultant is then divided by 52 to give the Sales P.W.P.S. for all stores not selling fresh meat after 6:00 P.M.

[2] This figure is also derived from the "Company Totals per Report" on the last page of def. un. ex. 3F. The total earnings of $17,586,426 are reduced by $632,062, the latter being the total earnings for the 32 stores in which fresh meat was sold after 6:00 P.M. The difference is divided by 216, the latter being the number of stores in which fresh meat was not sold after 6:00 P.M. The resultant is then divided by 52 to give the Earnings P.W.P.S. for all stores not selling fresh meat after 6:00 P.M.

APPENDIX H

1959

COMPARISON OF 28 STORES IN 1959 SELLING FRESH MEAT AFTER 6:00 P.M. WITH THE DIVISIONS IN WHICH NONE OF THE STORES SOLD FRESH MEAT AFTER 6:00 P.M. IN 1959 AND WITH ALL STORES IN WHICH NO FRESH MEAT WAS SOLD AFTER 6:00 P.M. IN 1959

	28 Stores In Which Fresh Meat Sold After 6:00 P.M. def. ex. 48	Fresh Meat *Not* Sold After 6:00 P.M.			All Stores In Which No Fresh Meat Sold After 6:00 P.M. (211 Stores)
		Division 2 (39 Stores) def. ex. 3E, p. 2	Division 5 (40 Stores) def. ex. 3E, p. 5	Division 6 (30 Stores) def. ex. 3E, p. 6	
Sales P.W.P.S.	$25,988	$28,080	$27,040	$29,708	$30,554[1]
Earnings P.W.P.S.	$ 538	$ 1,339	$ 1,364	$ 1,481	$ 1,476[2]
% Earnings To Sales	2%	4.7%	5.2%	5.0%	4.8%

[1] This figure is derived from the "Company Totals per Report" on the last page of def. un. ex. 3E. The total sales P.W.P.S. of $335,974,836 are reduced by $727,671, the latter being the total sales P.W.P.S. for the 28 stores in which fresh meat was sold after 6:00 P.M. The difference is divided by 211, the latter being the number of stores in which fresh meat was not sold after 6:00 P.M. The resultant is then divided by 52 to give the Sales P.W.P.S. for all stores not selling fresh meat after 6:00 P.M.

[2] This figure is also derived from the "Company Totals per Report" on the last page of def. un. ex. 3E. The total earnings of $17,004,549 are reduced by $784,139, the latter being the total earnings for the 28 stores in which fresh meat was sold after 6:00 P.M. The difference is divided by 211, the latter being the number of stores in which fresh meat was not sold after 6:00 P.M. The resultant is then divided by 52 to give the earnings P.W.P.S. for all stores not selling fresh meat after 6:00 P.M.

APPENDIX I

1958

COMPARISON OF STORES SELLING FRESH MEAT AFTER 6:00 P.M. WITH STORES NOT SELLING FRESH MEAT AFTER 6:00 P.M. FOR THE YEAR 1958

	Stores Selling Fresh Meat After 6:00 P.M.	Stores Not Selling Fresh Meat After 6:00 P.M.
Number of Stores[1]	20	201
Total Sales Per Week[2]	$ 567,939	$ 6,161,028
Total Earnings Per Year[3]	$1,009,030	$13,160,274
Total Sales P.W.P.S.[4]	$ 28,397	$ 30,651
Earnings P.W.P.S.[5]	$ 952	$ 1,235
% Earnings To Sales	3.3%	4%

[1] The total number of stores is taken from def. un. ex. 3D. The number of stores selling fresh meat after 6:00 P.M. is taken from pl. ex. 16. The difference between the total stores and the number of stores selling fresh meat after 6:00 P.M. equals the number of stores *not* selling fresh meat after 6:00 P.M.

[2] These figures are derived from def. un. ex. 3D. The column "Total Sales P.W.P.S." was added to obtain the grand total of sales per week for all stores. Subtracted from this grand total were the sales per week of the stores selling fresh meat after 6:00 P.M. The difference equals the sales per week of the stores *not* selling fresh meat after 6:00 P.M.

[3] These figures are taken from pl. ex. 16 opposite the columns titled respectively "Total annual earnings of stores selling meat at nite" and "Total annual earnings of stores not selling meat at night."

[4] These figures are derived by dividing the total sales per week for the group of stores selling meat after 6:00 P.M. by the number of stores in that group, and by dividing the total sales per week for the group of stores *not* selling meat at night by the number of stores in that group.

[5] These figures are derived by dividing the total earnings of the stores selling meat after 6:00 P.M. by the number of such stores. The resultant is then divided by 53 in accordance with def. un. ex. 3D. The same method is followed for the stores *not* selling meat after 6:00 P.M.